

## Silicon Flatirons Crash Course:

### The State of Privacy Law in California

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## Presenters



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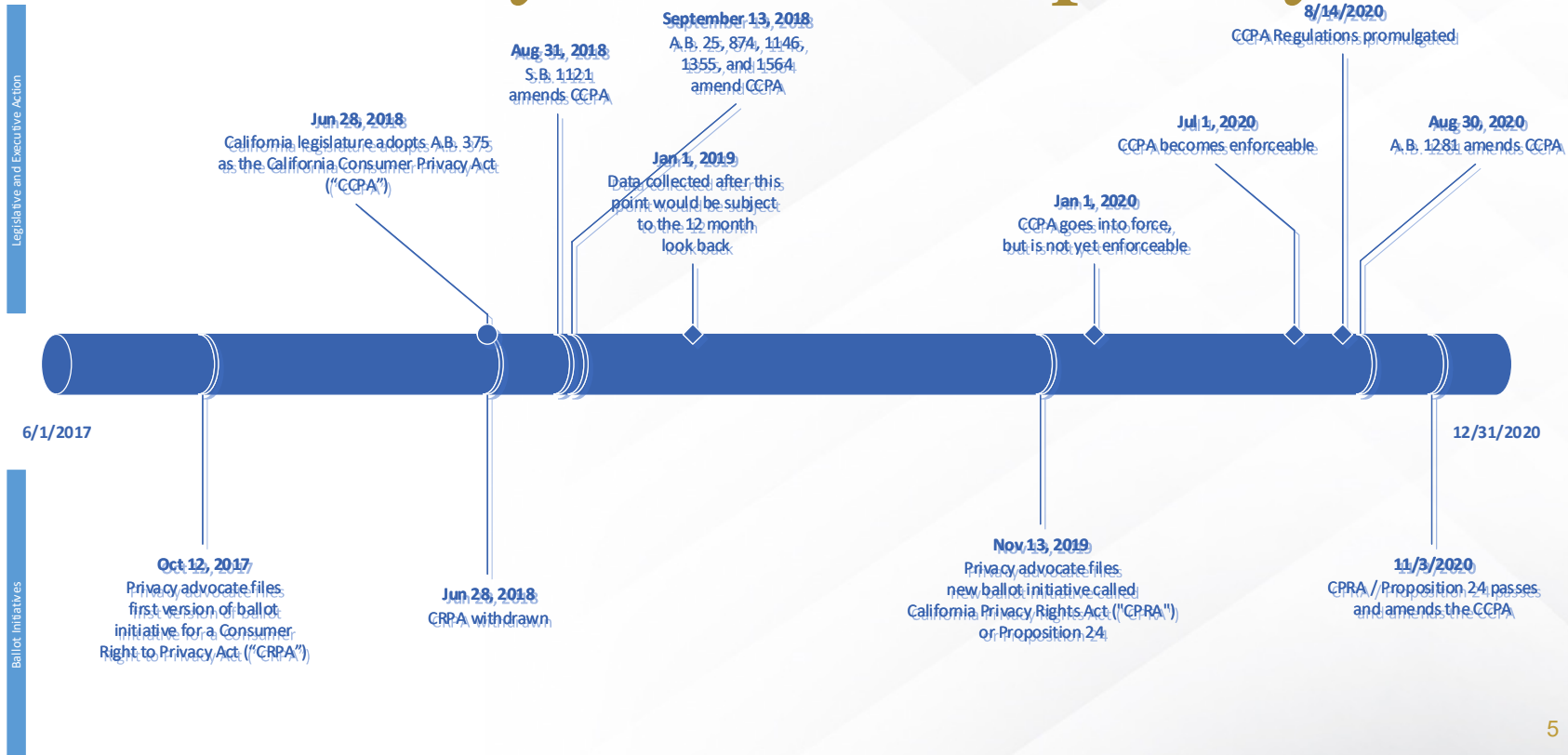
## Topics

- 1. The odd development of California data privacy law**
- 2. Complying with the CCPA / CPRA**
- 3. Selection of most frequently asked questions on California privacy law**
- 4. Question & Answer**

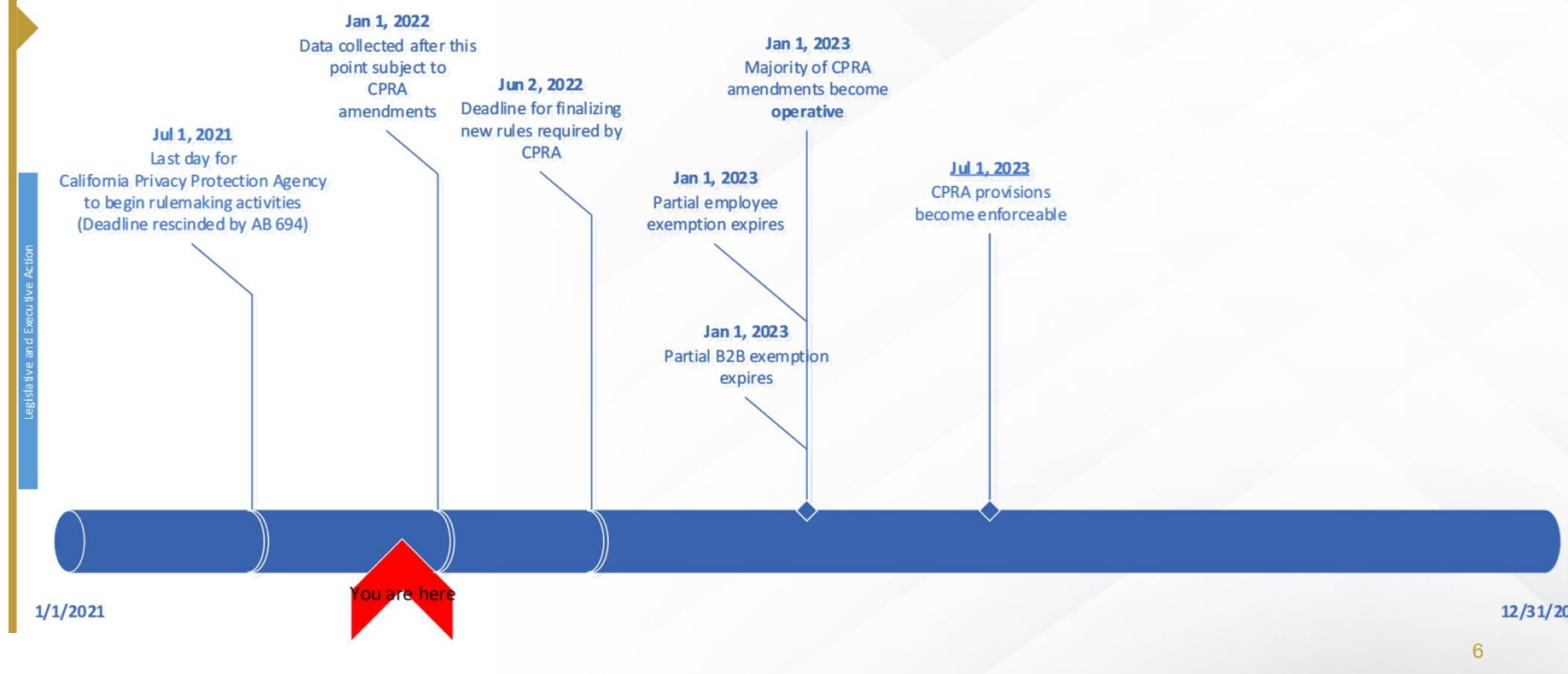
## 1. Odd history of California privacy law



# 1. Odd history of California privacy law



# 1. Odd history of California privacy law



### 3. Complying with the CCPA/CPRA

	GDPR	CCPA
<b>Ability to Process Data</b>	Permissible Purpose Data Minimization	
<b>Individual Rights</b>	Notices to Data Subjects	Notices to Data Subjects
		Financial Incentive Disclosure
	Right to Access Data	Right to Access Data
	Right to Fix Errors	
	Right to Be Forgotten	Right to Be Forgotten
	Right to Object to Other Uses	Right to Opt Out of Sale
		Right to Services on Equal Terms
<b>Accountability &amp; Governance</b>	Documentation / record keeping (Data inventory & DPIA) Designated DPO (if necessary)	
<b>Security</b>	Appropriate Data Security Breach Notification	Appropriate Data Security <i>Breach Notification</i>
<b>Data Transfers Outside of EEA</b>	Adequacy measures req. for transfers to countries w/ laws that don't parallel EEA	
<b>Transfers to Third Parties</b>	Contractual Requirements in Processor Agreements Joint controllers allocate responsibilities	Contractual Requirements in Service Provider Agreements
<b>Marketing &amp; AdTech</b>	Consent for AdTech cookies Consent prior to direct marketing	Consent for AdTech cookies (not expressly req'd, but impacts compliance risks)

## 2. Complying with the CCPA/CPRA

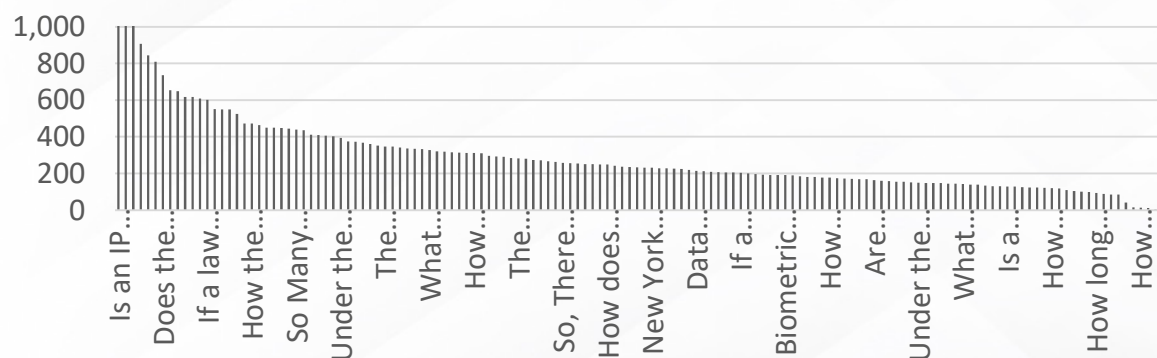
	GDPR	CCPA	CPRA
Ability to Process Data	Permissible Purpose		
	Data Minimization		<b>Data Minimization</b>
Individual Rights	Notices to Data Subjects	Notices to Data Subjects	Notices to Data Subjects
		Financial Incentive Disclosure	Financial Incentive Disclosure
	Right to Access Data	Right to Access Data	Right to Access Data
	Right to Fix Errors		<b>Right to Fix Errors</b>
	Right to Be Forgotten	Right to Be Forgotten	Right to Be Forgotten
		Right to Opt Out of Sale	<b>Right Opt-Out of Beh. Advertising</b>
	Right to Object to Other Uses		Right to Opt-Out of Sale
			<b>Right to Obj. to Use of Sen. Info</b>
			<b>Right to Obj. to Auto Decision-making &amp; Profiling</b>
		Right to Services on Equal Terms	Right to Services on Equal Terms
Accountability & Governance	Documentation / record keeping (Data inventory & DPIA)		<b>Documentation / record keeping (security audit and/or privacy risk assessment)</b>
	Designated DPO (if necessary)		
Security	Appropriate Data Security	Appropriate Data Security	Appropriate Data Security
	Breach Notification	<i>Breach Notification</i>	<i>Breach Notification</i>
Data Transfers Outside of EEA	Adequacy measures req. for transfers to countries w/ laws that don't parallel EEA		
Transfers to Third Parties	Contractual Requirements in Processor Agreements	Contractual Requirements in Service Provider Agreements	Contractual Requirements in Service Provider Agreements
	Joint controllers allocate responsibilities		
Marketing & AdTech	Consent for AdTech cookies	Consent for AdTech cookies (not expressly req'd, but impacts compliance risks)	Consent for AdTech cookies (not expressly req'd, but impacts compliance risks)
	Consent prior to direct marketing		



### 3. Selection of Most Frequently Asked Question

CCPA/CPRA	
Ability to Process Data	
Individual Rights	Data Minimization Notices to Data Subjects Financial Incentive Disclosure Right to Access Data Right to Fix Errors Right to Be Forgotten Right Opt-Out of Beh. Advertising Right to Opt-Out of Sale Right to Obj. to Use of Sen. Info Right to Obj. to Auto Decision-making & Profiling Right to Services on Equal Terms
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Readership of Questions



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Accountability & Governance	Documentation / record keeping (security audit and/or privacy risk assessment)
Security	Appropriate Data Security <i>Breach Notification</i>
Data Transfers Outside of EEA	
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#### Q. 91 Will the CPRA Require Publishing The Data Retention Period that Applies to Personal Information?

- Most privacy laws in the US do not require data minimization, and do not force companies to disclose their retention periods.
- Beginning on January 1, 2023, the CPRA requires that companies include in their notice at collection “the length of time the business intends to retain each category of personal information” that it collects.

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#### Q. 122 Can a company be sued by consumers for failing to post a privacy notice?

- No
- The private right of action under the CCPA only applies to allegations that a company had inadequate security that lead to a data breach.
- The CCPA does not permit private enforcement of the mandate that a company provide a notice at collection or a privacy notice.
- Enforcement is from the California AG and/or the California Privacy Protection Agency.

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#### Q. 367 If a business offers a financial incentive, what is it required to do?

- Under the CCPA:
  - Notify the consumer of the financial incentive.
  - Obtain the consumer's "opt-in" consent to the material terms.
  - Permit the consumer to revoke their consent at anytime.
- Under the regulations implementing the CCPA:
  - Include an explanation of how the financial incentive is "reasonably related" to the value of the consumer's data including a "good-faith estimate of the value of the consumer's data that forms the basis for offering the . . . Incentive."

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#### Q. 129 Did the CCPA create the right to access?

- No; In the United States several laws that predated the CCPA conferred access rights including:
  - HIPAA for medical records.
  - FERPA for student records.
  - GDPR for data subject to the GDPR.
  - Various state laws also granted sectoral access rights such as for employees to personnel records.

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#### Q. 200 Does the CCPA have a right to correction?

- No. It was not part of the original CCPA.
- The right was added as part of the CPRA and goes into effect in 2023.
- Unlike other rights (e.g., right to access) the right of correction is relatively new in the United States and was only found in a limited number of pre-existing privacy statutes such as the Fair Credit Reporting Act.

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**Q. 165 If a business receives a deletion request, is it prevented from collecting personal information about the consumer in the future?**

- No.
  - A deletion request is not “persistent”
  - It does not prevent a company from recollecting information from you in the future, or recollecting information about you from third parties.
  - It is functionally a point-in-time request.

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#### Q. 341 Is the use of behavioral advertising cookies considered the sale of personal information?

- There is a lot of ambiguity.
- During the rulemaking process the position of the Office of the Attorney General was that it's a "fact-specific question"
- Some of the variables might be:
  - Did the consumer give opt-in consent?
  - Did the behavioral advertising company agree to limit its use, retention, and disclosure of collected data?
  - Did the company that placed the AdTech on its website get something back specific to that placement?



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#### Q. 212 How many businesses include a “Do Not Sell my personal information link” on their homepage?

- 21.4% of the Fortune 500 posted a “do not sell” link on their homepage.
- 78.6% of the Fortune 500 did not post a “do not sell” link.

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#### Q. 39 & 40 Do the CCPA and CPRA have the same definition of “sensitive” personal information?

- The CCPA did not technically have a definition for “sensitive personal information” but it de facto treated 13 data fields as sensitive and gave them enhanced protections (e.g., SSN, Drivers License Number, etc.)
- The CPRA introduced the explicit definition of “sensitive personal information” which included 21 data fields. These were given different privacy rights
- There is some overlap between the two groups, but they are not synonymous.
- The net result is that there are functionally two different groups of “sensitive” personal information under the CCPA/CPRA – those that are sensitive for security reasons and those that are sensitive for privacy reasons.

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**Q. 243 Do the CCPA's data security provisions apply to all types of personal information?**

- No.
- The CCPA refers to 55 different data types in connection with the data privacy (collection, use, and intentional disclosure), but only imposes a security obligation in relation to ~13 data types.

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#### Q. 69 Is a service provider (CCPA) the same thing as a processor (GDPR)?

- Not exactly
- The CCPA and GDPR contain similar definitions of the two terms, but:
  - CCPA's definition of a "service provider" is functionally driven by the contract. If a contract does not have use, sharing, and disclosure prohibitions then the entity is arguably not a service provider.
  - The GDPR, on the other hand requires that processors agree to certain provisions, but does not condition their designation upon it.
  - The GDPR has also been interpreted in a manner in which certain vendors are not processors because they exercise unique discretion or professional judgment (e.g., lawyers); its unlikely that the CCPA would be interpreted in the same way.
  - Net result is that while there is probably 90% symmetry, there are differences on the fringes.

**GT** GreenbergTraurig

## **4. Question and Answer**

# Thank You!



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